REMARKS/ARGUMENTS

Currently, claims 9, 21, 22, 24, 27 and 28-31 stand rejected under 35 U.S.C. § 112, second paragraph. Additionally, claims 1, 3-9, 14-17, 32 and 81 stand rejected under 35 U.S.C. § 102(b) as anticipated by U.S. Patent No. 3,620,769 to Peterson; claims 1, 3-9, 14-17, 32, 38 and 81 stand rejected under 35 U.S.C. § 102(e) as anticipated by U.S. Patent Application Publication No. 2004/0109933 to Roy et al.; claims 10-13, 19, 20, 22, 24, 27-31 and 36 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent Application Publication No. 2004/0109933 to Roy et al. in view of U.S. Patent No. 6,309,686 to Zietlow; claims 18, 21, 23, 25, 26 and 33 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Roy et al. in view of U.S. Patent No. 6,270,216 to Zietlow; and claims 34 and 35 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Roy et al. in view of '216 to Zietlow and Igoe. By this response, claims 1, 3-11, 16-17, 20, 24 and 27 have been amended and claim 28 has been canceled.

In the Office Action of April 24, 2007, the Examiner rejected claims 9, 21, 22, 24, 27 and 28-31 under 35 U.S.C. § 112, second paragraph for failing to particularly point out and distinctly claim the subject matter which the Applicant regards as the invention. More specifically, the Examiner found the term "major portion" to be a relative term. In response, claim 9 as been amended and the term "major portion" replaced with the term "majority". Claim 27 has been amended to depend from claim 20, rather than claim 26. Additionally, claim 20 has been amended to depend from claim 1 rather than claim 11, and should now be in correct form for allowance. Dependent claims 21, 22, 24 and 27 all depend from claim 20, which has been amended, and should also be in correct form for allowance. Likewise, claim 30 depends ultimately from claim 20, as does claim 31, and these claims should be in correct form for allowance. As previously mentioned, claim 28 has been canceled.

On page 4 of the Office Action, claims 1, 3-9, 14-17, 32 and 81 stand rejected under 35 U.S.C. § 102(b) as anticipated by U.S. Patent No. 3,620,769 to Peterson. The Examiner states that all of the limitations of the invention are met by Peterson and points

to a moisture content of about 7% and about 10% moisture (Examples B, 2 and 3). The Applicant respectfully disagrees with this assertion. With reference to paragraph 2, line 1, Peterson teaches an example B, wherein a marshmallow includes 7.25 parts water. However, 7.25 parts water does not equate to percent moisture content. Indeed, Peterson notes that "it is preferred that the marshmallow formulations contain more than 19 percent water and less than 27 percent water, since below 19 percent a danger of crystallization of the sugars occurs..." See paragraph 2, lines 45-49. In example 2, lines 1-11 of paragraph 5, the percentage of water to balance out the numbers to 100% equals 12.82%. Further, example 3, lines 20-36 of paragraph 5, gives no moisture percentage at all. However, it is reasonable to assume that the percentage of moisture was within the desired range as set forth by the Peterson specification, that is, 19-27%. Regardless of the moisture content, Peterson does not teach a glass transition temperature or springback factor as instantly claimed. The Examiner states that "it would be expected that Peterson inherently teaches of a product that has a glass transition temperature and springback factor as instantly claimed." See page 5 of the Office Action. However, Peterson has a different composition then the claimed invention, and no such assumption can reasonably be made, especially when the moisture content of Peterson is different from the claimed invention. Under § 102, a reference must teach all of the limitations of the claimed subject matter. Peterson does not teach a moisture content in the range as claimed in the present invention, nor does Peterson teach the glass transition temperature or springback factor as claimed. Therefore, the Examiner has failed to meet his burden of proof under § 102.

On page 6 of the Office Action, the Examiner has rejected claims 1, 3-9, 14-17, 32, 38 and 81 under 35 U.S.C. § 102(e) as anticipated by U.S. Patent Application Publication No. 2004/0109933 to Roy et al. Roy et al. does not teach the glass transition temperature or springback factor required in claim 1. Under § 102, a reference must teach all of the limitations of the claimed subject matter. The Examiner states that, "[s]ince Roy teaches a similar confection with the instantly claimed softening agent within the instantly claimed range, it would be expected that Roy inherently teaches of a product that has a glass transition temperature and springback factor as instantly claimed.

The present invention is directed to a **soft dried** marshmallow. The Applicant has emphasized that the present invention has physical and chemical properties that differ from the cited prior art. Importantly, the present invention provides for a marshmallow that is dried and shelf stable, but is also soft in texture, even when immersed in a cold fluid. The novel physical aspects of the present invention are quantified using glass transition temperature (Tg) and springback factor limitations. As is known in the art, aerated confections are relatively soft and pliable above their specific Tg, and typically have a firm or hard texture below their Tg. In support of these facts, see, for example, U.S. Patent No. 6,387,432, column 3, lines 18-23. The softness of an aerated confection can also be evaluated using a bulk compression test to provide a springback factor, or the percentage of lost volume recovered after the confection is compressed. See paragraph 0053 of the present application. Again, the Examiner has failed to meet his burden of proof under § 102.

On page 8 of the Office Action, the Examiner rejected claims 10-13, 19, 20, 22, 24, 27-31 and 36 under 35 U.S.C. § 103(a) as being unpatentable over Roy et al. in view of U.S. Patent No. 6,309,686 to Zietlow. Claim 28 has been canceled. The Examiner admits that Roy is silent to what size are appropriate and how the marbits are consumed. Additionally, as argued above, Roy does not teach glass transition temperature or springback factor required in claim 1. The Examiner relies on '686 to Zietlow, which does not teach the glass transition temperature or springback factor. In view of the arguments set forth above outlining the limitations not met by Roy, it is respectfully submitted that each and every limitation of claims 10-13, 19, 20, 22, 24, 27, 29-31 and 36 have not been met by Roy, either alone or in combination with '686 to Zietlow.

On page 10 of the Office Action, the Examiner rejected claims 18, 21, 23, 25, 26 and 33 under 35 U.S.C. § 103(a) as being unpatentable over Roy et al. in view of U.S. Patent No. 6,270,216 to Zietlow. The Examiner admits that Roy is silent as to the inclusion of 0.1-5% calcium, the form of the topical coating or the inclusion of at least one vitamin, a wafer form with a thickness of 1-5mm or 0.05-1% high intensity sweetener. Additionally, as argued above, Roy does not teach glass transition

temperature or springback factor required in claim 1. In view of the arguments set forth above outlining the limitations not met by Roy, it is respectfully submitted that each and every limitation of claims 34 and 35 have not been met by Roy, either alone or in combination with '216 to Zietlow.

Regardless, '216 to Zietlow et al. is directed to a dried, **crisp, frangible** marshmallow owned by the assignee of the present invention. Note column 1, lines 35-36 of Zietlow et al., which states that the marshmallows "exhibit desirable crisp, frangible eating qualities." U.S. Patent No. '216 to Zietlow et al. clearly teaches away from a **dried soft** marshmallow having a softening agent sufficient to provide a **glass transition temperature of less than 5° C or the recited springback factor**. It is respectfully submitted that the Examiner has failed to provide proper motivation for the combination of references in the § 103 rejection.

On page 11 of the Office Action, the Examiner rejected claims 34 and 35 under 35 U.S.C. § 103(a) as being unpatentable over Roy et al. in view of '216 to Zietlow in view of the Dictionary of Food Ingredients, 4th Edition by Igoe. The Examiner admits that Roy is silent as to the inclusion of a high intensity sweetener such as sucralose. Additionally, as argued above, Roy does not teach glass transition temperature or springback factor required in claim 1. The Examiner withdrew the previous § 103 rejection of claim 1 based on Roy in view of '216 to Zietlow and Igoe. In view of the arguments set forth above outlining the limitations not met by Roy, it is respectfully submitted that each and every limitation of claims 34 and 35 have not been met by Roy, either alone or in combination with '216 to Zietlow and Igoe.

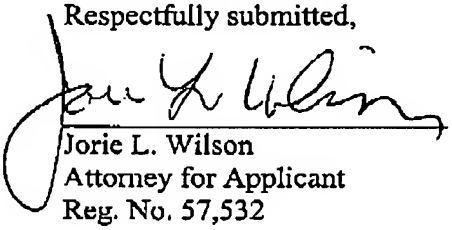
Again, '216 to Zietlow et al. is directed to a dried, **crisp, frangible** marshmallow owned by the assignee of the present invention and clearly teaches away from a **dried soft** marshmallow having a softening agent sufficient to provide a **glass transition temperature of less than 5° C or the recited springback factor**. The Examiner also cited Igoe, which teaches that glycerin can be utilized in a marshmallow. It is

respectfully submitted that the Examiner has failed to provide proper motivation for the combination of references in the § 103 rejection.

The Applicant continues to assert that the present invention has unique physical characteristics which are quantified by the glass transition temperature and springback factor. However, the Applicant notes that these limitations have not been fully considered by the Examiner. In accordance with the M.P.E.P., it is respectfully requested that the Examiner aide the Applicant in ascertaining what information, if any, the Applicant would need to present to advance prosecution in this case. For example, would the Examiner find it helpful to receive an affidavit from the inventor explaining glass transition temperature and springback factor? The Applicant is eager to work with the Examiner on this issue.

Based on the above, it is requested that the prior art rejections be withdrawn, the claims allowed and the application passed to issue. If the Examiner should have any additional concerns regarding the allowance of the application that can be readily addressed, she is cordially invited to contact the undersigned at the number provided below in order to further expedite the prosecution.

Respectfully submitted,



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